

Exploring the Distinction between Object and Effect in the Notion of Competition Restriction within the Framework of the Competition Act 2010

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Abstract

The Competition Act 2010 addresses the vital concept of “restriction of competition” and its implications for various types of agreements. To comprehend the concept, the Competition Commission of Pakistan, under Section 4 of the Competition Act 2010, distinguishes between “restriction by effect” and “restriction by object” when assessing agreements’ impact on competition. Such a distinction is of utmost significance in competition law enforcement. The analysis of “object-category agreements” is a practical and cost-effective mechanism for enforcing Section 4 of the Competition Act 2010. It allows the Competition Commission of Pakistan to expeditiously identify agreements inherently harmful to competition, reducing the need for in-depth market definition and analysis of market players’ standings. This approach offers legal certainty by classifying certain agreements as anti-competitive by their very nature. In contrast, the “effect-category agreements” require a more comprehensive evaluation. Determining their anti-competitive effects involves assessing factors like market structure and economic context. This procedure entails intricacies and difficulties, necessitating the Competition Commission of Pakistan to evaluate agreements on an individual basis using a rule of reason or quick look approach. The Competition Commission of Pakistan’s attempt to define the “restriction of competition” draws guidance from the European Union competition rules. Both jurisdictions emphasize the importance of distinguishing between agreements that restrict competition by object and those that do so by effect. This adherence to international precedents assist in establishing a uniform and cohesive framework for competition law in Pakistan, providing guidance and legal certainty to all parties engaged in agreements covered by the relevant provisions of the Competition Act 2010.

Keywords: Restriction of Competition, Object-Category Agreements, Effect-Category Agreements, Competition Commission of Pakistan, Competition Act 2010, Market Structure

1. Introduction

In the context of Pakistan, the competition rules of the European Union served as a model, and the World Bank provided technical assistance in drafting the competition law. The experts involved in this process were well-versed in European Union competition rules, making it a convenient foundation for drafting the law. Consequently, Pakistan’s competition law framework has drawn inspiration from European Union principles and has incorporated the best practices advocated by international instruments like the “United Nations’ set of multilaterally accepted equitable principles and rules” for

managing anti-competitive business practices, as well as the “OECD’s recommendations and best practices” pertaining to competition law and policy (Mirza & Daudpota, 2007).

Under Section 4 Competition Act 2010 (CA 2010), “...*agreements between undertakings which have as their object or effect to restrict competition are prohibited*”.¹ In other words, “any agreements, concerted practices, or decisions made by associations of undertakings” that either inherently aim at or result in restricting competition within the “relevant market” are declared illegal. The question that emerges is: What constitutes a restriction of competition? Trstenjak (Advocate General) presented her viewpoint in “*Competition Authority v Beef Industry Development Society Ltd*” that understanding the concept of competition restriction can be challenging (*Competition Authority v Beef Industry Development Society Ltd*, 2008, para. 42). Any agreement or decision that undermines, distorts, or hampers competition among businesses and the competitive dynamics in the market necessitates thorough examination. (Zahid & Rana, 2021)

The article intends to analyze the substantive norm prohibiting anti-competitive activities, with a specific focus on the concept of “restriction of competition”. It draws comparisons between the notion of competition restriction in Pakistan and the corresponding concept in European Union competition rules, where necessary, as the Competition Act of 2010 of Pakistan finds its roots in these rules. The article aims to address the following questions: What defines a “competition restriction” according to Section 4 of the Competition Act 2010, and how does it impact various types of agreements or decisions? How do the Competition Commission of Pakistan distinguish between “restriction by effect” and “restriction by object” when evaluating whether an agreement constrains competition, and what is the significance of this distinction in competition law enforcement? What are the legal implications for parties involved in “object-category agreements” under Competition Act 2010, and how does this framework provide legal certainty regarding the anti-competitive nature of such agreements? How does the assessment of “effect-category agreements” under Section 4 Competition Act 2010 differ from that of “object-category agreements”, and what challenges and complexities arise in determining the anti-competitive effects of agreements? What principles and legal precedents from the European Union’s competition rules have influenced the Competition Commission of Pakistan’s

¹ Competition Act No. XIX of 2010 (Published in the Gazette of Pakistan, Extraordinary, 13 October 2010) [CA 2010], § 4: “Prohibited agreements: (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Act.

(2) Such agreements include, but are not limited to:

- (a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;
- (b) dividing or sharing of markets for goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means;
- (c) fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means of providing any services; or
- (d) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service; or
- (e) collusive tendering or bidding for sale, purchase or procurement of any goods or service;
- (f) applying dissimilar condition to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and
- (g) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Any agreement entered into in contravention of the provision sub-section (1) shall be void”.

approach to defining the “restriction of competition”?

2. Object-Category Agreements

An agreement under Section 4 CA 2010 is considered established when there is a mutual intent to restrict competition, even if the exact details of the restrictive terms are still being discussed (*FMC Foret, SA v Commission, 2011, para. 98*). Consequently, an agreement is subject to Section 4 CA 2010’s prohibition when its “object or effect” is to impede, limit, or distort competition within the relevant market. This criterion serves as a benchmark for determining whether Section 4 CA 2010 applies to an agreement or not.

The Competition Commission of Pakistan (CCP) has clarified the meaning of the term “object” as used in Section 4 of CA 2010 within the context of “*Karachi Stock Exchange (Guarantee) Limited*” Case. It explained that “agreements that inherently curtail competition are regarded as possessing that inherent object”. The CCP explicitly stated that, in Section 4 of CA 2010, the term “object” does not cover the personal intentions of the parties at the time of entering into the agreement, but rather to “the objective interpretation and purpose of the agreement, assessed within the economic context in which it is intended to be applied” (*Competition Commission of Pakistan, 2009, para. 42*). Some cases suggest that when assessing whether an agreement “restricts competition by object”, factors like the “provisions of the agreement”, its intended “objectives”, and the “economic and legal context” in which it operates should be taken into consideration. When assessing this “context”, it is essential to consider both the “nature of the goods or services” under consideration and the “actual conditions” that affect the functioning and structure of the relevant market(s) (*Expedia Inc. v Autorité de la concurrence, 2012, para. 21 & Allianz Hungária Biztosító Zrt v Gazdasági Versenyhivatal, 2013, para. 36*).

The use of the word “or” between “object” and “effect” in Section 4 of CA 2010, similar to Article 101(1) “Treaty on the Functioning of the European Union” (TFEU), signifies that the criteria specified in this section provide alternative options to determine if an agreement constrains competition or not (*LTM Société Technique Minière v Maschinenbau Ulm GmbH, 1966, p. 249, ING Pensii v Consiliul Concurenței, 2015, para. 30 and Toshiba Corporation v Commission, 2016, para. 24*).

In the European Union (EU), following the judgment in “*LTM Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH*”, it has become established case law that the “alternative nature” of the requirement, as denoted by the word “or” in Article 101(1) TFEU, has been firmly established. The European Commission clarifies this point in its “*Guidelines on the application of Article 101(3) TFEU*”, in the following words: “The distinction between restrictions by object and restrictions by effect is important. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take into account its concrete effects” (*European Commission, 2004, p. 97, point 20*). In “*Competition Authority v Beef Industry Development Society Ltd*”, the EU Court observed that the distinction between “infringements by object” and “infringements by effect” stems from the fact that specific forms of collaboration among undertakings can intrinsically disrupt the proper functioning of competitive markets (*Competition Authority v Beef Industry Development Society Ltd, 2008, para. 17, T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit, 2009, para. 29, Expedia Inc. v Autorité de la concurrence, 2012, para. 36, Groupement des cartes bancaires v Commission, 2014, para. 50*).

The CCP, in its decisions, referenced numerous judgments from the EU Courts and academic literature elucidating principles of the EU competition rules to explain the term “object” and the alternative

aspect of the requirement. For instance, in “*Karachi Stock Exchange (Guarantee) Limited*” Case, the CCP highlighted that an agreement whose object is to limit competition, “there is no requirement to demonstrate that the agreement would result in an adverse effect on competition in order to establish a violation” of law (*Competition Commission of Pakistan, 2009, para. 42*).

Likewise, in “*All Pakistan Akhbar Farosh Federation, All Pakistan News Papers Society*” (APNS) Case, the CCP highlighted that agreements aimed at limiting competition are subject to rigorous scrutiny and are deemed unlawful in jurisdictions with well-established competition law jurisprudence. In this context, the CCP specifically cited the European Union’s competition rules as an illustrative example. It asserted that a fundamental criterion for establishing a violation under Article 101(1) TFEU is an agreement whose “object or effect is to prevent, restrict or distort competition” (*Competition Commission of Pakistan, 2009, pp. 20-21*). Moreover, it provided an instance from the “*LTM Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH*” Case, where the ECJ established that “object” and “effect” are not concurrent conditions but rather alternate prerequisites denoted by the conjunction “or”. The initial analysis should focus on the “object” within its economic context. Only when it becomes evident that the intention was not to impede or curtail competition, etc., should the “effect” be examined. Furthermore, since price-fixing agreements are *prima facie* presumed to have the “object of preventing, limiting, or diminishing competition”, there is no requirement to demonstrate their “effects” (*LTM Société Technique Minière v Maschinenbau Ulm GmbH, 1966, p. 249*). Similar interpretation is found in “*Establishments Consten SA Grundig-Verkaufs-GmbH v Commission*” Case. The Court determined that an agreement, regarded as having the aim of restricting competition (such as a price-fixing agreement), violates the law without the need to demonstrate its actual effect (*Establishments Consten SA Grundig-Verkaufs-GmbH v Commission, 1966, para. 342, and Blanco, 2011, p. 26*). Consequently, agreements of this nature are presumed to be anti-competitive without the possibility of challenging this presumption by proving that they did not, in fact, have such an effect. Any such agreement is *per se* illegal, and it cannot argue that it might have positive, pro-competitive effects and therefore should be permitted. Thus, the classification of an agreement as “restrictive by object” would rely on two factors: firstly, its intended “objective”, and secondly, the “economic and legal framework” in which it is adopted. Nevertheless, it is worth highlighting that hard-core restraints are invariably regarded as being inherently restrictive in nature, and it is improbable that any economic analysis would exempt them. Therefore, regardless of whether the “economic context” is considered, such agreements remain prohibited. (Egervari, 2011)

The analysis of object-category agreements functions as a cost-efficient enforcement mechanism for the competition authorities and the legal certainty is provided to parties involved in such agreements. In “*T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*”, Kokott (Advocate General) highlighted that having a prohibition on a practice due to its inherently anti-competitive nature establishes “legal certainty” and enables all participants in the market to adjust their behavior accordingly. She also stated that categorizing specific agreement types as inherently restrictive by object, with detrimental consequences for society, “prudently conserves the resources of competition authorities and the judicial system”. (*Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit, 2009*) In “*Competition Authority v Beef Industry Development Society Ltd*”, Trstenjak (Advocate General) emphasized that the concept of restricting competition by “object” should not be limited to a comprehensive list. Hence, it should not be confined exclusively to the specific instances of anti-competitive agreements explicitly listed in Article 101(1) TFEU itself. (*Competition Authority v Beef Industry Development Society Ltd and another, 2008*)

The concept of restricting competition encompasses both “horizontal and vertical agreements”. “Horizontal agreements” are agreements formed by competitors operating at the “same level within the production or distribution chain”, engaging in collaboration with one another. These agreements lead to a violation when competitors enter into agreements that limit competition among themselves. In contrast, “vertical agreements” exist between “purchasers and vendors operating at distinct tiers of the production or distribution chain”, and these agreements have the likelihood to infringe competition laws. The limitations that qualify as “restrictions by object in horizontal agreements” encompass “price fixing, output constraints, and the division of markets and customers”. Given that prices are the primary tool of competition, collusive agreements and strategies employed by producers fundamentally seek to raise prices for their advantage, surpassing the levels dictated by conditions of free competition. Market allocation and price fixing, inherently, curtail competition.

In “*All Pakistan Akhbar Farosh Federation, All Pakistan News Papers Society*” (APNS) Case, the CCP asserted that for a “collusive horizontal agreement” to achieve success, there must be a system for “detection and monitoring” to prevent any form of dishonest behavior. This traditional “carrot and stick” strategy has been pivotal in ensuring the effectiveness of collusive price-fixing arrangements. The CCP emphasized that this “monitoring mechanism”, or the “stick”, is widely recognized as crucial for agreement success and cited Posner, as stated in *Anti-trust Law*: “A collusive price cannot be expected to persist through sheer inertia”. Every participant in the collusive group has a motivation to slightly lower the price to boost their own profits. (Competition Commission of Pakistan, 2009) This aspect of agreements and arrangements can be characterised as a restriction of competition. It is noteworthy to reiterate in this context that the prohibition outlined in Section 4 of CA 2010 relates to the act of “entering” into a prohibited agreement, and it does not necessitate the establishment of its execution for the purpose of establishing a violation. (Ibid)

It is important to highlight that in “*All Pakistan Cement Manufacturer Association*” (APCMA), the CCP underscored another crucial principle, namely, that “an undertaking facilitating or contributing to the cartel” in any capacity can face penalties for engaging in cartel behavior, regardless of whether the undertaking is directly involved in forming the cartel or not. Hence, the CCP has the authority to commence legal proceedings under CA 2010 against any undertaking that played a role in facilitating a cartel. As an example, it cited the case of the European Commission’s decision in the “*Organic Peroxides*” Case, where a €1000 penalty was imposed on AC Treuhand AG, a consulting firm. (European Union, 2005) On March 16, 2004, AC Treuhand initiated legal proceedings against the European Commission before the court that was known as the Court of First Instance at that time. AC Treuhand contended that the Commission had made an error in attributing liability to it for violating Article 101 TFEU, arguing that it had solely offered services to other organic peroxides producers and was not engaged in market activities. However, the Court dismissed this claim and upheld the determination of infringement (along with the associated fine) against AC Treuhand. The Court concluded that any undertaking that has engaged in collusive behavior, including “consultancy firms” without market involvement in the competition-restricted area, could have reasonably anticipated that the prohibition stipulated in Article 101(1) TFEU would generally be applicable to it. Such an undertaking could not have been unaware, or lacked the means to comprehend that a sufficiently evident and well-defined foundation had already existed in the former decision-making patterns of the European Commission and in the established EU legal precedents. This foundation explicitly acknowledged the liability of a “consultancy firm” for breaching Article 101(1) of TFEU when it actively and deliberately contributes to a cartel formed by producers operating in a market distinct from that of the consultancy firm itself. (AC-Treuhand AG v Commission) Regarding AC Treuhand’s

involvement in this case, in particular, the Court determined that the petitioner was fully aware of the circumstances and acted deliberately when it provided its “professional expertise” and resources to the “cartel”, with the aim of deriving some form of benefit from it, even if only indirectly, through the execution of the individual agency agreements that connected it to the three organic peroxide producers. (Ibid)

3. Effect-Category Agreements

Agreements which do not have the object of restricting competition must be analysed as to their effects. It means when the object of the agreement to distort, reduce or restrict competition is not that obvious, its effects are to be taken into account. (Blanco, 2011) There is no presumption of anti-competitive effects in the case of restrictions of competition by effect. (European Commission, 2004) To qualify as a restrictive agreement by its effect, it should influence competition, whether current or potential, to a degree where noticeable adverse consequences, such as price increases, reduced production, limited innovation, or a decline in the diversity or quality of products and services, can be reasonably anticipated in the relevant market. (Ibid) Even though Article 101(1) TFEU does not explicitly use the term “appreciable”, it is evident from the jurisprudence of EU Courts and the administrative practices of the European Commission that a competition-restricting act would not be covered by Article 101(1) TFEU unless it has a “noticeable effect” on competition within the relevant market. (Parker Pen Ltd v Commission, 1994 & Publishers Association v Commission, 1992). In other words, Article 101(1) TFEU does not cover the conduct which restricts competition, but has an insignificant effect on competition in the relevant market. The Court of Justice, in “*Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH*”, clarifies this point (LTM Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.), 1966).

In 2014, the European Commission issued a revised “*Notice on agreements of minor importance*”.² This notice is specifically focused on addressing agreements that are of minor significance (*de minimis* doctrine (European Commission, 2014). The Commission specifies, using market share thresholds as a guide, the situations in which it deems that agreements, which could potentially result in preventing, limiting, or distorting competition within the internal market, are not regarded as an “appreciable” competition restriction under Article 101 TFEU. (Ibid) According to the notice, Article 101(1) TFEU is not applicable when specific market share thresholds are not exceeded, and there are no “hard-core restrictions”. For horizontal agreements (agreements between competitors), a criterion of a maximum of 10% combined market share in “any of the relevant markets” is applicable. In the context of vertical agreements (agreements between non-competitors), a standard of maximum 15% market share for each of the parties in any of the relevant markets is valid (Ibid). In situations where it is challenging to categorize the agreement as either horizontal or vertical, the 10% maximum threshold is relevant. (Ibid) In every instance, the threshold may be exceeded by up to 2% in two consecutive calendar years. (Ibid) Thus, agreements between undertakings which may affect trade between Member States and do not inherently aim to prevent, restrict or distort competition within the internal market are not deemed to significantly restrict competition as per the definition in Article 101(1) TFEU, provided that the market share thresholds do not surpass the mentioned limits.

In practice, the Commission typically refrains from initiating legal actions in situations where the agreement involves undertakings with market shares below the relevant thresholds, unless the

² The first notice on agreements of minor importance was issued in 1970. See European Commission, Notice on agreements of minor importance, OJ C 64, 2.6.1970, p. 1.

agreement includes a “hard-core restriction” (*Expedia Inc. v Autorité de la concurrence and others*, 2012). The “*Notice on agreements of minor importance*” excludes agreements that, by their “very nature”, aim to “prevent, restrict or distort competition within the internal market” (European Commission, 2014). In “*Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*”, Kokott (Advocate General) emphasized that operating a vehicle while under the influence of alcohol exposes a driver to potential criminal or administrative penalties, regardless of whether the driver was directly responsible for causing an accident. Thus, under EU competition rules, undertakings can violate these rules and may face fines when they participate in “concerted practices with an anti-competitive purpose”, without regard to whether such actions actually result in adverse market effects in a specific instance (*Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 2009).

The Competition Act 2010 lacks a similar level of clarity concerning agreements categorized by their effects. There is a notable absence of explicit guidelines from the CCP for evaluating agreements based on their “object” and “effect”. It is essential to establish such guidelines to ensure legal certainty and consistency.

However, in several of its decisions, the CCP stated that when “an agreement has the object of preventing, restricting or reducing competition”, there is no necessity to evaluate its adverse effects on competition, and the CCP is not obligated to define a relevant market. (Competition Commission of Pakistan, 2011) For example, in “*Pakistan Banks’ Association*”, the Appellate Bench of the CCP held that: “.... we, independent of EU and U.S. jurisprudence are of the view, that if the agreement has the object of preventing, restricting or reducing competition, there is no need to assess its anti-competitive effects, for which ordinarily relevant market is defined”. (Competition Commission of Pakistan Order, 2009) The CCP, aligning with the legal principles that have developed in Pakistan, affirmed that actions lacking economic evidence demonstrating their pro-competitive advantages are considered restrictions by object. (Competition Commission of Pakistan Order, 2011)

In Pakistan, under CA 2010, the exemption standards are delineated in Section 9 of CA 2010. This section contemplates a “rule of reason” inquiry to assess whether the advantages of the restraint significantly outweigh the detrimental effects of reduced or diminished competition. However, such an analysis is unnecessary in situations where the agreement is inherently aimed at restricting competition. (Ibid) Nonetheless, the CCP has acknowledged that when an agreement in question is a new and does not distinctly qualify as a *per se* violation, the application of the “quick look” or even a comprehensive “rule of reason” approach should be considered. In a “quick look” approach, the Appellants must either provide a rationale for why the restraint is improbable to adversely affect consumers or present a competitive advantage that reasonably counterbalances the apparent or expected harm. (Competition Commission of Pakistan Order, 2009) In an appeal filed by “*Pakistan Banking Association and others*”, the Appellant Bench affirmed that the CCP had utilized the “quick look” approach in its decision. The Appellant Bench confirmed that the discussions within the CCP’s decision distinctly demonstrated the utilization of the “quick look” approach. (Competition Commission of Pakistan Order, 2008) In this context, the CCP clarified that aligning with EU competition rules does not imply that Pakistan is exclusively bound to consider EU case law and principles as the sole source of persuasive legal precedents. It expressed that it has, over time, established its own body of legal principles and is not bound by any specific international jurisprudence. (Competition Commission of Pakistan Order, 2008) Nevertheless, the CCP’s assertion lacks support upon reviewing its own decisions. There is an absence of a clear indication regarding the extent of actual departure from any specific international legal

precedents.

4. Defining the Relevant Market

In the EU competition regime, defining the “relevant market” serves the purpose of establishing whether an agreement has the probability to “impact trade between Member States” and whether it has the “object or effect to prevent, restrict or distort competition within the internal market”. Hence, the European Commission is mandated to define the market in a decision invoking Article 101(1) TFEU solely in cases where it is impossible to ascertain, without such a definition, whether the “agreement”, the “decision” made by an association of undertakings, or the “coordinated practice” in question could potentially influence trade between Member States and possess the aim or outcome of obstructing, limiting, or distorting competition within the internal market (*Brouwerij Haacht NV v Commission*, 2005). The prohibition under Article 101(1) TFEU is not applied when the identified adverse impacts on the markets are deemed negligible (*Franz Völk v S.P.R.L. Ets J. Vervaecke*, 1969). This test corresponds with the “economic approach” used by the European Commission. Article 101(1) TFEU’s prohibition comes into play only when a thorough market analysis indicates that the agreement is likely to have substantial anti-competitive repercussions on the market. (*European Night Services Ltd (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission*, 1998)

In “*Visa International*” case, the European Commission conducted a comprehensive enquiry and granted clearance to specific provisions of the “Visa International payment card system”. The Commission held a favorable stance concerning particular provisions within the “Visa International payment card scheme”, which had been formally submitted for clearance. One of these provisions is referred to as the “no-discrimination rule”, which restricts traders from charging customers fees for using a Visa card or offering discounts for cash payments. The Commission determined that eliminating this provision would not significantly enhance competition. (*European Commission*, 2001)

To evaluate an agreement, it is essential to consider its market context and employ an “economic approach”. According to established case law, to ascertain if an agreement restricts competition through its effects, competition should be assessed within the “actual context” in which it would occur if the agreement and its alleged limitations did not exist. (*John Deere Ltd v Commission*, 2001) In the process of this evaluation, it is essential to take into account the likely impact of the agreement on both “inter-brand competition”, which involves competition among “suppliers of distinct brands”, and “intra-brand competition”, which deals with competition among “distributors of the same brand” (*European Commission*, 2004). Article 101(1) TFEU prohibits “restrictions of both inter-brand competition and intra-brand competition” (*Establishments Consten SA Grundig-Verkaufs-GmbH v Commission*, 1966). In “*Stergios Delimitis v Henninger Bräu AG*” Case, the ECJ concentrated on the consequences for “inter-brand competition” and deliberated on the elements to be considered during the evaluation. It clarified that the examination of competitive conditions is not solely reliant on the ongoing competition among already established undertakings in the relevant market. It also encompasses an evaluation of potential competition, with the aim of determining whether, given the market’s structure and the “economic and legal” environment in which it functions, there are tangible and practical opportunities for the concerned undertakings to engage in competition with each other or for new competitors to access the relevant market and engage in competition with the established undertakings. If it is determined that entry into the market is obstructed, the next step requires an assessment of whether the agreement in question significantly adds to this obstacle. (*Stergios Delimitis*

v Henninger Bräu, 1991) In “*LTM Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH*” Case, which concerned an “exclusive distribution agreement”, the ECJ highlighted the necessity of assessing the impact of such an agreement in the context of the competition that would transpire if the agreement in question did not exist. By adopting this perspective, the Court reached the conclusion that an “exclusive distribution agreement” would not violate Article 101(1) TFEU if it can be proven that it was imperative for the manufacturer to access the market. (*LTM Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH*, 1966) In “*T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*”, Kokott (Advocate General) pointed out that Article 101 TFEU, along with the other competition provisions of the Treaty, aims to safeguard not just the immediate interests of individual competitors or consumers but also the overall market structure and, consequently, competition itself. This approach also offers indirect protection to consumers since, when competition as a whole is disturbed, it raises concerns about potential disadvantages for consumers as well. (*T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 2009)

In the context of Pakistan, the “*PESCO Tender*” Case sparked a debate concerning whether it is obligatory to delineate the relevant market in accordance with Section 4 of CA 2010, addressing the importance of such definition. It is important to emphasize that when it comes to instances of collusive behavior, which are prohibited by Section 4 of CA 2010, there exists an underlying presumption that all the undertakings involved operate within the same market, whether that market is horizontal or vertical in nature. Clearly, if they were not operating in the same market, the issue of collusion would not have arisen in the first instance. Furthermore, in cases of collusion, the concept of market power holds no significance, and the crucial factor is the “agreement to collude”. It is imperative to bear this principle in mind while interpreting Section 4(1) of CA 2010. The CCP emphasized the need to differentiate between unilateral anti-competitive conduct (cases of abuses of a dominant position under Section 3 of CA 2010) and multilateral anti-competitive conduct (cases of collusion under Section 4 of CA 2010). In situations related to the “abuse of a dominant position”, it is imperative to identify a relevant market as a fundamental requirement to ascertain the existence of dominance and any potential abuse thereof. According to the perspective of the CCP, this implies that market power becomes a pertinent consideration in discussions concerning “abuse of a dominant position” cases, particularly when examining the unilateral conduct of a business undertaking. Nonetheless, the necessity to define the “relevant market” in collusion cases is not mandatory for establishing an anti-competitive act. Consequently, as per the CCP’s viewpoint, the presence of market power is not a pertinent factor in collusion and cartelization cases. In collusion cases, what holds significance is the presence of a collusive agreement or decision. Thus, the delineation of a relevant market in collusion cases serves merely as a reference point. The CCP is not obligated to define a relevant market in collusion cases, and the language of Section 4 of CA 2010 does not impose such an obligation. (Competition Commission of Pakistan, *PESCO Tender Order*, 2011)

CA 2010 offers a comprehensive list of various practices that are presumed to restrict competition. These practices encompass agreements to set purchase or selling prices, divide or distribute markets, curtail production, distribution, technical advancements, or investments, as well as collusive tendering or bidding for sales, and tying arrangements, which obligate customers to purchase one product to obtain another. Additionally, CA 2010 designates other practices that also fall within the same category. For example, constraints within distribution agreements that restrict the customer base or geographic reach of distributors are regarded as restrictive in specific circumstances. As mentioned earlier, the concept of competition restriction encompasses both “horizontal and vertical agreements”.

“Horizontal agreements” are made between competitors, while “vertical agreements” are established between buyers and sellers operating at distinct levels of the “production or distribution chain”, and these agreements are highly likely to contravene competition law provisions. For example, “*All Pakistan Akhbar Farosh Federation, All Pakistan News Papers Society*” (APNS) Case involved two horizontal price fixing agreements. The first agreement involved the establishment of a minimum cover price for newspapers by a subcommittee of APNS. The second agreement pertained to the dissemination of the “Minimum Cover Price Formula” by APNS to its members. On 28 April 2008, during a subcommittee meeting, the participants reached a consensus that the price of the newspapers must be raised and number of pages must be reduced by all member publishers following the “Minimum Price Formula”. Consequently, such a decision fell under the legal definition of an “agreement”. APNS subsequently affirmed the subcommittee’s decision in letters distributed on 28 April 2009, and 2 May 2009. Hence, APNS’s decision to determine a minimum newspaper price constituted a “decision of an association of undertakings” in accordance with the law. Such collusive behavior leads to market inefficiency. Instead of working towards producing a more economically optimized product and improving its quality, newspapers were evading competition among themselves in the market place. In the end, it is the end-consumer who bears the adverse consequences of such collusive behavior and market inefficiency. This results in consumers having a limited choices to select newspapers and no pricing alternatives within the relevant market.

A vertical agreement existed between APNS and the All Pakistan Akhbar Farosh Federation to implement the decision of the “minimum newspaper price by means of resale price maintenance”. Consequently, this agreement imposed a limitation on the trading terms for the distribution of newspapers, thereby “preventing, restricting, and reducing competition within the relevant market”. On 29 April 2008, APNS convened a meeting in Lahore with the All Pakistan Akhbar Farosh Federation with the aim of establishing an agreement or mutual understanding for the implementation of the minimum cover price decision. Moreover, they requested the Federation’s commitment that newspapers would not be distributed below the set minimum price. Every participant of the meeting consented to this decision (Competition Commission of Pakistan, 2009).

In this case, the CCP drew a distinction between “vertical price-fixing agreements” and “horizontal price-fixing agreements” due to their distinct characteristics. The CCP asserted that vertical price-fixing agreements constrain the right of alienation and, as a result, are related to common law principles concerning property rights. The CCP stated that vertical agreements are considered acceptable only when they stimulate competition among manufacturers selling different brands of similar products (inter-brand), while also reducing competition among retailers selling the same brand of product (intra-brand). For instance, a vertical agreement that enforces a “minimum resale price” may be permissible if it fosters inter-brand competition. Nonetheless, the CCP observed that in the present case, the price of newspapers was set collectively by APNS (publishers), with the cooperation of the All Pakistan Akhbar Farosh Federation (distributors) to ensure compliance with their price-fixing decision. Hence, the vertical agreements between publishers and distributors clearly intended to eliminate competition between different brands by setting a uniform price for all newspapers within the relevant market. (Ibid)

The undertakings are, therefore, prohibited from collectively setting and raising prices. They are prohibited from sharing cost or price-related information with rivals and establishing production quotas among competitors. Moreover, they are not allowed to engage in mutual agreements to divide or allocate territory, products, or customers among themselves. They are also prohibited from entering

into mutual agreements to refrain from supplying certain customers or to exclusively purchase from specific suppliers. Additionally, imposing resale prices or any other conditions, such as profit margins, is not allowed for businesses functioning at separate stages of the production or distribution process, like producers and distributors. Nevertheless, the imposition of maximum resale prices may be considered permissible. On occasion, trade associations are utilized as a platform that enables competitors to engage in prohibited agreements. However, it is crucial to recognize that trade associations should not function as venues for competitors to deliberate upon and exchange information.

5. Conclusion

This article examines the substantive provision governing anti-competitive practices, placing particular emphasis on the notion of a “restriction of competition”. It has, when relevant, made comparisons between the concept of competition restriction in Pakistan and the similar concept in European Union competition rules. This comparison is valuable given that the Competition Act of 2010 in Pakistan is grounded in the principles of EU competition rules. In summary, the concept of a “restriction of competition” can be outlined as follows:

Firstly, an agreement must either be intended to or have the consequence of restricting competition. Both CA 2010 and the TFEU consider the object-effect dichotomy. The CCP and the European Commission (and the EU Courts) in their orders/decisions (and judgments) identify the scope and meaning of ‘restriction by effect’ and ‘restriction by object’, and their alternative nature in order to determine whether or not an agreement restricts competition. For instance, in “*Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH*”, the Court made it clear that Article 101(1) TFEU is applicable to agreements that either aim to or result in the prevention, limitation, or distortion of competition. “Object” and “effect” are separate criteria, and they do not need to both be present. Therefore, if an agreement restricts competition by its nature (object), it is not necessary to demonstrate that it also restricts competition in practice (effect), and vice versa. (*Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH*, 1966)

In practice, the primary aim of the agreement should be examined first. If its purpose is to constrain competition, there will be no necessity to examine the impacts of the agreement, as it is considered an infringement of competition rules. The CCP and the European Commission, in their examination of object-category agreements (hard-core agreements), can set aside numerous intricacies associated with the markets in question. For instance, there is essentially no need for defining the market or analyzing the positions of the parties engaged in that market. As described earlier, the procedure adopted for analysing the object-category agreements can thus be viewed as a mechanism to minimize the costs involved in enforcing Article 101 TFEU and Section 4 CA 2010. In cases of the object-category of agreements, the parties engaged can be certain from a legal perspective that they are aware of the potential outcome of including, for example, a price-fixing clause in an agreement. In order to avoid the *per se* applicability of Article 101 TFEU and Section 4 CA 2010, parties must refrain from engaging in such “object-category agreements” (hard core restrictions). Both the TFEU and CA 2010 list agreements that are inherently deemed anti-competitive.

Secondly, the phrase “restriction of competition” encompasses both the “prevention and distortion of competition”. This point is clarified in the CCP’s decisions and the European Commission “*Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements*” (European Commission, 2011)

Thirdly, when it cannot be said that an agreement is restrictive in nature due to its “object”, it should be assessed based on its “effect”. This assessment should take into account both existing and potential impacts. In essence, the agreement should, at the very least, be capable of producing anti-competitive effects. Where an agreement produces “appreciable” negative effects for competition, it falls within the purview of Article 101 (1) TFEU and Section 4 CA 2010. In other words, agreements that, based on their intended purpose, do not seem to restrict competition, may nonetheless result in anti-competitive consequences. The legal framework concerning “effect-category agreements” is quite intricate. However, the European Commission, in its “Guidelines on the application of Article 101(3) of the Treaty”, provides sufficient guidelines in order to enable undertakings to assess the compliance of their agreement with Art 101(1) TFEU. The European Commission Guidelines clarify that for an agreement to qualify as having competition-restricting effects under Article 101(1) TFEU, it should possess the potential to cause a significant adverse effect on one of the competitive elements in the market, which could include factors like price, production levels, product quality, product diversity, or innovation.(Ibid) The Commission issued a “*Notice on agreements of minor importance*” which sets criteria for market shares below which agreements are considered to have minimal impacts on competition. In this notice, the European Commission establishes the threshold for what qualifies as an “appreciable” restriction of competition under Article 101 TFEU. However, it is essential to note that this Notice and its market share criteria do not pertain to restrictions by object. The competition legal framework in Pakistan contains some areas of ambiguity. Although the CCP’s decision and guidelines regarding Section 4 of CA 2010 provide some clarity on these aspects, there is a distinct requirement for more precise guidelines in this matter. (Competition Commission of Pakistan, 2016)

It is significant to highlight that Article 101(3) TFEU makes no distinction between “agreements that restrict competition by object and agreements that restrict competition by effect” (European Commission, 2004). This provision is applicable to all agreements that satisfy the four conditions specified by the Article. The requirements include: improvements in the “production or distribution of goods” or contributions to “technical or economic” progress; consumers obtaining an equitable share of the resulting benefits; the imposed “restrictions” being essential to attain the objectives; and no potential to “eliminate competition” with regard to a substantial part of the relevant products. The burden to prove that an agreement satisfies the conditions of Article 101(3) TFEU lies with the party seeking to argue that its cartel agreement could generate efficiency-improving outcomes.

In Pakistan, the exemption standards are outlined in Section 9 of CA 2010, which outlines a “rule of reason enquiry” to assess whether the advantages of the restraint significantly outweigh the negative consequences of reduced or diminished competition. This evaluation is not necessary in situations where the agreement has the primary “object” of restraining competition (Competition Commission of Pakistan, PESCO Tender Order, 2011). Nevertheless, the CCP acknowledges that in cases where the agreement in question is unconventional and does not clearly qualify as a *per se* violation, a “quick look” or a “rule of reason” approach should be applied. With the “quick look” approach, the appellants are required to either pinpoint a rationale suggesting that the restraint is improbable to detrimentally impact consumers or highlight a competitive advantage that credibly counterbalances the apparent or expected harm (Competition Commission of Pakistan Order, 2009). The CCP asserts that Pakistan’s competition regime is not restricted to following EU case law and principles exclusively. They emphasize that over time, they have developed their own competition jurisprudence. However, a review of the CCP’s decisions does not offer substantial evidence to substantiate the CCP’s, and there is no clear indication of the extent of actual deviation from specific international legal precedents.

Fourthly, it is important to note that both Section 4 of CA 2010 and Article 101 TFEU apply to agreements, whether they are horizontal or vertical in nature (*Establishments Consten SA Grundig-Verkaufs-GmbH v Commission*, 1966). In “*Establishments Consten SA Grundig-Verkaufs-GmbH v Commission*”, the Court affirmed that Article 101 TFEU generally applies to all agreements that disrupt competition within the internal market and does not make any distinction based on whether such agreements involve competitors at the “same level in the economic process” or non-competing entities operating at different tiers (*Ibid*). The Court also emphasized that, in cases where the Treaty does not explicitly differentiate, no distinction should be presumed. Vertical restrictions, in general, tend to be less detrimental than horizontal ones and can often offer opportunities for efficiency gains. The European Commission has released Guidelines on vertical restrictions, which underscore that Article 101 TFEU establishes a legal framework for evaluating such restrictions and takes into consideration the differentiation between anti-competitive and pro-competitive effects (European Commission, Guidelines, 2011), and Guidelines on horizontal cooperation agreements. In the case of most vertical restraints, issues related to competition would typically emerge only when there is an insufficient level of competition present in one or more trade levels. This usually occurs when there is some degree of market power held by either the supplier, the buyer, or both at these levels. The CCP also furnishes guidelines pertaining to both horizontal and vertical restrictive agreements (Competition Commission of Pakistan, Guidelines, 2016).

Fifthly, both Section 4 CA 2010 and Article 101 (1) TFEU are applicable not just to restrictions on existing competition but also on potential competition. In “*Visa Europe Ltd and Visa International Service v Commission*”, the General Court determined that excluding a potential competitor had effects that constrained competition within the scope of Article 101(1) TFEU. This was because the introduction of a new entrant would have presented opportunities for increased competition in the market (*Tiercé Ladbroke SA v Commission*, 1997). Similar interpretation is presented in the CCP’s decision and the guidelines pertaining to Section 4 CA 2010.

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